University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 64 | May, 1916. | NUMBER 7

FEDERAL IMPEACHMENTS.

The writers on the judicial history of England disagree as to when the English impeachments began. Stephens in his "History of the Criminal Law of England" says [1] that the first case was against David, the brother of Llewellyn in 1283. Pike in his "Constitutional History of the House of Lords" says [2] that it was against Richard Lyons, a merchant of London, in 1376. Hallam in his "Constitutional History of England" [3] and Anson in his "Law and Custom of the Constitution" [4] agree with Pike that it was in 1376, but say that it was against Lord Latimer.

Perhaps each of these writers fixes too early a date, if the present method of impeachment is meant, for it is reasonably clear that there was no fixed or determinate method of procedure, until after the passage of the statute of 1 Henry IV, c. 14, in 1399. Before that date the King sometimes made the complaint in person or through his Attorney-General;[5] sometimes it was made by members of the House of Commons or House of Lords;[6] and sometimes it was made by outside officials more or less directly connected with the subject matter of the contro-

[1] Page 146.
[2] Page 205.
[3] Page 255.
[4] Page 362.
[5] 1 Howells St. Tr. 54; 4 *Ibid* 83.
[6] 2 *Ibid* 1268.

versy.[7] So also sometimes the trial was before the King alone;[8] sometimes before the King and the House of Lords together;[9] sometimes knights, earls, barons, and other men of note, including representatives of the boroughs and cities, decided the impeachment;[10] and at least once a jury was called in to render its decision.[11]

By the statute of 15 Edward III, c. 2, it is provided "that no peer of the land, officer, nor other because of his office . . . shall be brought in judgment . . . but by award of the said peers in Parliament" and during that reign

"the most usual course seemed to have been for the Commons to present a memorial to the King in Parliament, stating such offences as they thought at the time peculiarly injurious to the public, and praying that the delinquents (without naming them) might meet the punishment of the law. After the petitioners had received encouragement from the crown, they exhibited articles of impeachment, specifying the particular culprits, and attended the prosecution through the several stages, till, finally, on conviction they demanded judgment."[12]

Richard II, however, determined to get rid of the power of Parliament in matters of impeachment, and to that end, in 1387,

"he proposed to the judges, among others, the following question: 'Since the king can, whenever he pleases, remove any of his judges and officers, and justify or punish them for their offences, whether the lords and commoners can, without the will of the king, impeach in Parliament any of the said judges or officers for any of their offences?', to which the answer was 'that they cannot; and if any one should do so, he is to be punished as a traitor.' "[13]

Parliament severally animadverted on that opinion the next year, but later and more subservient parliament confirmed it, and matters remained in that shape until the king resigned September 30, 1399, and was succeeded by Henry IV, in the first year of whose reign Parliament annulled the proceedings above

[7] 4 Hatsell's Precedents, 67.
[8] 1 Howell's St. Tr. 40.
[9] 1 Howell's St. Tr. 126.
[10] 1 Stephens' History of the Criminal Law of England 146.
[11] Hale's Jurisdiction of Parliament 91.
[12] Woodeson's Lectures 598-599.
[13] *Ibid* 600.

recited, by the statute of 1 Henry IV, c. 3, and a little later the same year passed the statute of 1 Henry IV, c. 14, above referred to, which thereafter forbade "appeals" in Parliament and left only impeachments to be tried therein.[14] Shortly thereafter the Lords refused to try impeachments unless they were instituted by the Commons,[15] other complaints being relegated to the regular judicial officers or tribunals for their decision; and the practice thus established continued until after the Federal Convention met, in 1787, and the Constitution of the United States promulgated by it was adopted.

That the practice in the English impeachments and the abuses thereof were alike well known to the members of that Convention appears from the reports of the debates therein. Indeed the impeachment of Warren Hastings, in charge of Burke, Sheridan, and Fox, was dragging its weary length along during all that period, and the members of the Convention frequently referred to it. Keeping those facts well in mind we can best understand what was done by the Convention, and why they did it.

When it got down to work on May 29, 1787, Edmund Randolph of Virginia, submitted "sundry propositions in writing", and Charles Pinckney of South Carolina, submitted the "draft of a federal government", both of which papers were referred to the Committee of the Whole House.[16]

Mr. Randolph's ninth resolution provided, *inter alia:*

"9. Resd. that a National Judiciary be established . . . that the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, . . . impeachments of any National officers, and questions which may involve the national peace and harmony."[17]

Mr. Pinckney's "draught" was lost, but thirty-two years later he supplied what he believed to be a copy, though of even that he was not certain, which provided, *inter alia:*

[14] Woodeson's Lectures 600.
[15] 1 Stephens 156.
[16] Farrand's "Records of the Federal Convention" Vol. 1, p. 16.
[17] *Ibid* 21-22.

"That the President shall have power to grant pardons and reprieves, except in impeachments."[18]

. . . . . .

"He shall be removed from his office on impeachment by the House of Delegates and Conviction in the Supreme Court for Treason, Bribery or Corruption."[19]

. . . . . .

"One of these courts shall be termed the Supreme Court, whose Jurisdiction shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment affecting Ambassadors and other public ministers the Jurisdiction shall be original and in all other cases appellate.

"All criminal offences (except in cases of impeachment) shall be tried in the State where they shall be committed—the trial shall be open and public, and be by jury."[20]

Mr. Pinckney's "draught" does not seem to have been considered by the Committee of the Whole, which took up the Randolph resolutions *seriatim.*

When the length of the President's term (seven years) was under consideration, Gunning Bedford, Jr., of Delaware, opposed it, because it would not be known whether the person elected was capable. "An impeachment," he said, "would be no cure for this evil, as an impeachment would reach misfeasance only, not incapacity".[21] Elbridge Gerry of Massachusetts, was in favor of adding a council to advise the President because "their opinions may be recorded—they may be called to account for their Opinions & impeached." Edmund Randolph of Virginia was of opinion that there should be more than one executive, for "if one he cannot be impeached until the expiration of his office, or he will be dependent on the Legislature—such an Unity would be against the fixed Genius of America".[22] John Dickinson of Delaware, moved that the President "be removable by the national legislature upon request by a majority of the legislatures of the individual States" [23] and gave as his reasons that "he did not like the plan of impeaching the Great

[18] Farrand; Vol. 3, p. 599.
[19] *Ibid* 600.
[20] *Ibid.*
[21] 1 Farrand 69.
[22] *Ibid* 71.
[23] *Ibid* 78.

Officers of State".[24] The Convention voted down that resolution, and on motion of Hugh Williamson of North Carolina, agreed that the President should be "removable on impeachment and conviction of malpractice or neglect of duty".[25]

On June 13, 1787, Mr. Randolph moved and the Convention adopted the following resolution:

"That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony."[26]

All of Mr. Randolph's resolutions of May 29, 1787, having been considered and acted upon, it was resolved "that the committee do report to the Convention their proceedings".[27] In addition to the resolution above quoted in regard to the "jurisdiction of the national Judiciary", which was the thirteenth of the nineteen resolutions reported,[28] that report contained but one other resolution regarding impeachment, *viz.*, that proposed by Mr. Williamson as above:

"9. Resolved, that a National Executive be instituted to consist of a single person . . . to be removable on impeachment and conviction of malpractice or neglect of duty."[29]

On June 15, 1787, William Patterson of New Jersey, submitted a series of resolutions, which, with those of Mr. Randolph, were referred to a Committee of the Whole House.[30] His fifth resolution was:

"Resd. that a federal Judiciary be established to consist of a supreme Tribunal . . . that the Judiciary so established shall have authority to hear and determine in the first instance on all impeachments of federal officers."[31]

In the course of the debate on the Patterson resolution, Alexander Hamilton of New York, on June 18, 1787, presented a "sketch" of his ideas of a proper government, including the following:

[24] 1 Farrand 85.
[25] *Ibid* 223-224.
[26] *Ibid* 236.
[27] *Ibid* 241.
[28] *Ibid* 78.
[29] *Ibid* 238-239.
[30] *Ibid* 237.
[31] *Ibid* 244.

"IX. The Governour, Senators and all officers of the United States to be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office, and disqualified for holding any place of trust or profit—all impeachments to be tried by a Court to consist of the Chief or Judge of the Superior Court of Law of each State, provided such judge shall hold his place during good behavior, and have a permanent salary." [32]

The Committee of the Whole disagreed with the Patterson resolutions, never considered or acted on the Hamilton "sketch", reaffirmed its action on the Randolph resolutions, and so reported to the Convention on June 19, 1787.[33]

On July 18, 1787, the Convention unanimously struck out the words "impeachment of any national officers" from the thirteenth resolution relating to the "jurisdiction of the national judiciary".[34] This was done because it was feared that the judges might "be drawn into intrigues with the legislature and an impartial trial would be frustrated".[35] On the same day the resolution was amended so as to read:

"That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony."[36]

The next day, in a long speech, Gouveneur Morris urged that the term of the President be made short, that he be eligible for re-election, but not impeachable, but that the "great officers of State" who composed his cabinet be impeachable.[37]

On July 20, 1787, the Convention considered and approved the provision that the President was "to be removable on impeachment and conviction of mal-practice or neglect of duty."

Farrand reports the proceedings as follows:[38]

"Mr. Pinckney and Mr. Gouveneur Morris moved to strike out this part of the resolution. Mr. P. observed (ought not to) be impeachable whilst in office.

"Mr. Davie. If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He

[32] 1 Farrand 292-293.
[33] 2 Farrand 39.
[34] 2 Farrand 39.
[35] Pp. 64-69.
[36] *Ibid* 312.
[37] *Ibid* 39.
[38] *Ibid* 53-54.

considered this as an essential security for the good behavior of the Executive.

"Mr. Wilson concurred in the necessity of making the Executive impeachable whilst in office.

"Mr. Gouveneur Morris. He can do no criminal act without coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions? If it is not, the mischief will go on. If it is, the impeachment will be nearly equivalent to a displacement and will render the Executive dependent on those who are to impeach.

"Colonel Mason. No point is of more importance than that the right of impeachment should be continued. Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the coadjutors. There had been much debate and difficulty as to the mode of choosing the Executive. He approved of that which had been adopted at first, namely of referring the appointment to the National Legislature. One objection against electors was the danger of their being corrupted by the candidates: and this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practiced corruption and by that means procured his appointment in the first instance, be suffered to escape punishment by repeating his guilt?

"Doctor Franklin was for retaining the clause as favorable to the Executive. History furnishes one example only of a first Magistrate being formally brought to public justice. Everybody cried out against this as unconstitutional. What was the practice before this in cases where the Chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in which he was not only deprived of his life but of the opportunity of vindicating his character. It would be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it and for his honorable acquittal when he should be unjustly accused.

"Mr. Gouveneur Morris admits corruption and some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated and defined.

"Mr. Madison thought it indispensable that some provision should be made for defending the community against the incapacity, negligence or perfidy of the Chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of the Executive Magistracy was very distinguishable, from that of the legislative or of any other public body, holding offices of limited duration. It could

not be presumed that all or even a majority of the members of an assembly would either lose their capacity for discharging or be bribed to betray their trust. Besides the restraints of their personal integrity and honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

"Mr. Pinckney did not see the necessity of impeachments. He was sure they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence. His revisionary power in particular would be rendered altogether insignificant.

"Mr. Gerry urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted here that the Chief Magistrate could do (no) wrong.

"Mr. King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of governments should be separate and independent: That the Executive and Judiciary should be so as well as the Legislative: That the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be impeachable? It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary hold their places not for a limtied time, but during good behavior. It is not for a limited time, but during good behavior. It is necessary, therefore, that a forum should be established for trying misbehavior. Was the Executive to hold his place during good behavior? The Executive was to hold his place for a limited term like the members of the Legislature. Like them particularly the Senate whose members would continue in appointment the same term of six years. He would periodically be tried for his behavior by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them, therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior, a tenure which would be most agreeable to him; provided an independent and effectual forum could be devised. But under no circumstances ought he to be impeachable by the Legislature. This would be destructive to his independence and of the principles of the Constitution. He relied on the vigor of the Executive as a great security for the public liberties.

"Mr. Randolph. The propriety of impeachments was a favor-

ite principle with him. Guilt wherever found ought to be punished. The Executive will have great opportunities of abusing his power; particularly in time of war when the military force and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults and insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration an idea which had fallen (from Colonel Hamilton) of composing a forum out of the Judges belonging to the States: and even of requiring some preliminary inquest whether just grounds of impeachment existed.

"Doctor Franklin mentioned the case of the Prince of Orange during the late war. An agreement was made between France and Holland; by which their two fleets were to unite at a certain time and place. The Dutch fleet did not appear. Everybody began to wonder at it. At length it was suspected that the statholder was at the bottom of the matter. This suspicion prevailed more and more. Yet as he could not be impeached and no regular examination took place, he remained in his office, and strengthening his own party, as the party opposed to him became formidable, he gave birth to the most violent animosities and contentions. Had he been impeachable, a regular and peaceable inquiry would have taken place and he would if guilty have been duly punished, if innocent restored to the confidence of the public.

"Mr. King remarked that the case of the statholder was not applicable. He held his place for life, and was not periodically elected. In the former case impeachments are proper to secure good behavior. In the latter they are unnecessary; the periodical responsibility to the electors being an equivalent security.

"Mr. Wilson observed that if the idea were to be pursued, the Senators who are to hold their places during the same term with the Executive, ought to be subject to impeachment and removal.

"Mr. Pinckney apprehended that some gentlemen reasoned on a supposition that the Executive was to have powers which would not be committed to him: (He presumed) that his powers would be so circumscribed as to render impeachments unnecessary.

"Mr. Gouveneur Morris's opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a magistrate having a life interest, much less like one having an hereditary interest in his office? He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him. One would think the King of England well secured against bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was

bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery; corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. This Magistrate is not the King but the Prime Minister. The people are the King. When we make him amenable to justice, however, we should take care to provide some mode that will not make him dependent on the Legislature."

On July 23, 1787, it was moved and seconded "that the proceedings of the Convention for the establishment of a national government, except that respects the Supreme Executive, be referred to a Committee for the purpose of reporting a Constitution conformably to the Proceedings aforesaid—which passed unanimously in the affirmative".[39] This Committee known thereafter as the "Committee of Detail," consisted of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania.[40] On the next day the Committee of the Whole was discharged "from acting on the propositions" of Mr. Pinckney and Mr. Patterson, which were referred to the Committee of Detail.[41]

On July 26, 1787, the Convention again approved the provision that the President should "be removable on impeachment and conviction of malpractice and neglect of duty".[42]

The matters relative to the "Supreme Executive" were also referred to the Committee of Detail on the same day.[43] That Committee reported a draft of a constitution August 6, 1787, including the following:

"Art. IV, Sec. 6. The House of Representatives shall have the sole power of impeachment."[44]

"Art. X, Sec. 2. . . . He (the President) shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. . . . He shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption.[45]

[39] 2 Farrand 85.
[40] *Ibid* 97.
[41] *Ibid* 98.
[42] *Ibid* 116.
[43] *Ibid* 117.
[44] *Ibid* 178-179.
[45] *Ibid* 185-186.

"Art. XI, Sec. 3. The jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment the jurisdiction shall be original.[46]

"Art XI, Sec. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the State where they shall be committed, and shall be by jury.[47]

"Art XI, Sec. 5. Judgment, in cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States. But the party convicted shall, nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.[48]

"Art. XV. Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence."[49]

The Convention agreed to Art. IV, Sec. 6 on August 9, 1787,[50] apparently without debate so far as the above clause is concerned.

On August 20, 1787, various propositions were referred to the Committee of Detail, among them the following:

"Each of the officers above mentioned [*i. e.* the President and his Cabinet] shall be liable to impeachment and removal from office for neglect of duty, malversation or corruption.

"That the Committee be directed to report . . . a mode for trying the supreme Judges in cases of impeachment."[51]

Two days later that Committee reported in favor of a Privy-Council for the President, which included the cabinet officers, but said nothing as to their impeachment, and also reported that "the Judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives".[52]

On August 25, 1787, the Convention, without debate, struck out the words "but his pardon shall not be pleadable in bar of an impeachment" in Art. X, Sec. 2, and inserted in lieu thereof "except in cases of impeachment".[53] On August 27, 1787, con-

[46] 2 Farrand 186.
[47] *Ibid* 187.
[48] *Ibid* 187.
[49] *Ibid* 187-188.
[50] *Ibid* 187-188.
[51] *Ibid* 337.
[52] *Ibid* 367.
[53] *Ibid* 411.

sideration of the last clause of Art. X, Sec. 2, and Art. XI, Sec. 3, was postponed,[54] at the suggestion of Gouveneur Morris, because he thought the Supreme Court was not a proper tribunal to try an impeachment of the President, especially if, as was then being considered, the Chief Justice was to be a member of the proposed Privy Council.[55] The next day Art. XI, Sec. 4, was amended to read:

"The trial of all crimes (except in cases of impeachment) shall be by jury—and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the Legislature may direct."[56]

Art. XV being taken up, the words "high misdemeanor" were struck out, and "other crimes" inserted, in order to comprehend all proper cases, it being doubtful whether "high misdemeanor" had not a technical meaning too limited.[57] On August 31, 1787, it was moved and seconded "to refer such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on to a Committee of a Member from each State", which passed in the affirmative and a Committee was appointed by ballot of the honorable Mr. Gilman, Mr. King, Mr. Sherman, Mr. Brearly, Mr. G. Morris, Mr. Dickinson, Mr. Carroll, Mr. Madison, Mr. Williamson, Mr. Butler, and Mr. Baldwin.[58] That committee was known as the Committee of Eleven, and reported on September 4, 1787:

"In the place of the 9th article, 1st section to be inserted 'The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two-thirds of the members present.' "[59]

. . . . . .

"Sec. 3. The Vice-President shall be *ex officio,* President of the Senate, except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside."[60]

. . . . . .

[54] 2 Farrand 422-423.
[55] *Ibid* 435.
[56] *Ibid* 473.
[57] *Ibid.*
[58] *Ibid* 427.
[59] *Ibid* 443.
[60] *Ibid* 493.

"The latter part of the 2nd section, 10th article to read as follows: 'He shall be removed from his office on impeachment by the House of Representatives and conviction by the Senate, for treason or bribery, and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office the Vice-President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.' "[61]

In debating the changes thus made, James Wilson of Pennsylvania said on September 6, 1787:

"In allowing them (the Senate) to make the Executive and Judiciary appointments, to be the Court of impeachments, and to make treaties which are to be laws of the land, the Legislative, Executive and Judiciary powers are all blended in one branch of the Government. . . . According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate."[62]

The Convention, however, approved the report of the committee in the respect referred to.

On September 8, 1787, the journal shows[63] that in the Convention it was moved and seconded to insert the words "or other high crimes and misdemeanors against the State" after the word "bribery", which passed in the affirmative. It was moved to strike out the words "by the Senate" after the word "conviction", which passed in the negative. It was moved and seconded to strike out the word "State" after the word "against" and to insert the words "United States", which passed in the affirmative unanimously. On the question to agree to the last clause of the report it passed in the affirmative. It was moved and seconded to add the following clause after the words "United States": "The Vice-President and other civil officers of the United States shall be removed from office on impeachment and conviction as aforesaid", which passed in the affirmative unanimously.

In the place of the first section of the ninth article it was moved to insert: "The Senate of the United States shall have power to try all impeachments: but no person shall be convicted

[61] 2 Farrand 495.
[62] *Ibid* 545.
[63] *Ibid* 522-523.

without the concurrence of two-thirds of the Members present: and every Member shall be on oath", which passed in the affirmative.[64]

It was moved and seconded to appoint a committee of five "to revise the style of and arrange the articles agreed to by the House", which passed in the affirmative, and a committee was appointed by ballot of Mr. Johnson, Mr. Hamilton, Mr. G. Morris, Mr. Madison, and Mr. King. That committee was entitled the "Committee of Style and Arrangement." Mr. Madison in his report of the debate says:[65]

"The clause referring to the Senate, the trial of impeachments against the President, for treason and bribery, was taken up.

"Colonel Mason. Why is the provision restrained to treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined. . . . As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He moved to add after 'bribery' 'or maladministration'. Mr. Berry seconded him. . . .

"Mr. Madison. So vague a term will be equivalent to a tenure during pleasure of the Senate.

"Mr. Gouveneur Morris. It will not be put in force and can do no harm. . . . An election of every four years will prevent maladministration.

"Colonel Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors' (against the State).

"On the question thus altered:

"N. H. aye, Mas. aye, Ct. aye, (N. J. no.) Pa. no, Del. no, Md. aye, Va. aye, N. C. aye, S. C. aye, Del. aye (Ayes—8; noes 3).

"Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part.

"Mr. Gouveneur Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. He was against a dependence of the Executive on the Legislature, considering the

[64] 2 Farrand 547. [65] *Ibid* 550-552.

Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. . . .

"Mr. Pinckney disapproved of making the Senate the Court of Impeachments, as rendering the President too dependent on the Legislature. If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throw him out of office.

"Mr. Williamson thought there was more danger of too much lenity than of too much rigour towards the President, considering the number of cases in which the Senate was associated with the President. . . .

"Mr. Sherman regarded the Supreme Court as improper to try the President, because the judges would be appointed by him.

"On motion by Mr. Madison to strike out the word 'by the Senate' after the word 'conviction':

"N. H. no, Mas. no, Ct. no, N. J. no, Pa. aye, Del. no, Md. no, Va. aye, N. C. no, S. C. no, Geo. no (Ayes—2; noes—9).

"In the amendment of Colonel Mason just agreed to, the word 'State' after the words 'misdemeanors against' was struck out, and the words 'United States' inserted (unanimously) in order to remove ambiguity. . . .

"On the question to agree to clause as amended: N. H. aye, May. aye, (Cont. aye,) N. J. aye, Pa. no, (Del. aye,) Md. aye, Va. aye, N. C. aye, S. C. aye, Geo. aye (Ayes—10; noes—1).

"On motion, 'the Vice-President and other civil officers of the United States shall be removed from office on impeachment and conviction as aforesaid' was added to the cause on the subject of impeachments."

The Committee of Style and Arrangement made its report on September 12, 1787, which, so far as the present matter is concerned, provided as follows:

"Art. I, Sec. 2. (d) The House of Representatives shall choose their speaker and other officers; and they shall have the sole power of impeachment.[66]

. . . . . .

"Art. I, Sec. 3. (e) The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

"(f) Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold

[66] 2 Farrand 591.

and enjoy any office of honor, trust or profit under the United States: But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.[67]

. . . . . .

"Art. II, Sec. 2. The President . . . shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.[68]

. . . . . .

"Art. II, Sec. 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.[69]

"Art. III, Sec. 1. The Judicial power of the United States . . . shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts, shall hold their offices during good behavior. . . .[70]

"Art. III, Sec. 2. . . . The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed.[71]

"Art. III, Sec. 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [72]

On September 14, 1787, when that report was under consideration Mr. Rutledge and Mr. Gouveneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted." Mr. Madison said the President was made too dependent already on the Legislature, by power of one branch to try him in consequence of an impeachment by the other. "This intermediate suspension", he said, "will put him in the power of one branch only. They can at any moment, in order to make way for the functions of another who will be more favorable to their views, vote a temporary removal of the existing magistrate." Mr. King concurred in the opposition to the amendment and the question to agree was lost.[73]

On the next day, September 15, 1787, the Constitution as amended was agreed to by the Convention, and ordered to be

[67] 2 Farrand 592.
[68] *Ibid* 599.
[69] *Ibid* 600.
[70] *Ibid.*
[71] *Ibid* 601.
[72] *Ibid.*
[73] *Ibid* 612-613.

engrossed, all the states voting in favor thereof,[74] and in its engrossed form it was approved two days later.[75] The only changes from the foregoing were the addition of the words "or affirmation", after the word "oath" in Art. I, Sec. 3, and the exclusion of the word "only" from Art. III, Sec. 3.

The foregoing extracts from the resolutions and debates of the Federal Convention cover, it is believed, all that is reported therein relating strictly to impeachments, and all that have any bearing on the subject in the Constitution as originally adopted. The following, from among the amendments to the Constitution, have, however, a bearing upon the matters hereinafter to be considered:

5th Amendment. " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself."

6th Amendment. "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

10th Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

Under those constitutional provisions we come to the first great question which faces us.

In What Capacity Does the Senate Sit Upon the Trial of an Impeachment?

It would hardly seem that this could be an open question, or worthy of much debate if it were, yet it has been considered and acted upon in two of the impeachments in this country.

When Judge Chase was impeached, the Senate appointed a committee to propose and report rules for the conduct of the trial. In the Memoirs of John Quincy Adams, it is said:[1]

[74] 2 Farrand 633.

[75] *Ibid* 643-644-647.

[1] Vol. 1, p. 324.

"But the words *in open Court,* and *this Court* were in the reported rules, and Mr. Giles moved to strike them out on the ground that the Senate, sitting for the trial of an impeachment is not *a Court.* . . . His motive for this antipathy to the term *Court* is, that the Senate . . . may be absolved from all the rules and principles which restrain and bind down *courts of justice* to the *practice* of justice."

That motion was adopted. The motive thus attributed to Senator Giles is not that given by himself. His averred reason was this:

"Impeachment is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another.[2] . . . Impeachment was not a criminal prosecution; it was no prosecution at all. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him."[3]

The matter again came up during the impeachment of President Johnson. It is said in Hinds' *Precedents of the House of Representatives:*[4]

"In 1868, after mature consideration, the Senate decided that it sat for impeachment trials as the Senate and not as a court. . . . An anxiety lest the Chief Justice might have a vote seems to have led the Senate to drop the words 'High Court of Impeachment' from its rules."

The rules as originally drafted for that trial were entitled, "Rules of Procedure and Practice in the Senate when Sitting as a High Court of Impeachment." and in several places in the body thereof the Senate is called a court. Senator Conkling, though he had in fact helped draft those rules, moved to amend by striking out the word "court," saying, *inter alia:*

"Why leave it there? If it is a court we do not destroy that character by omitting these superfluities from our rules. If it is not a court we do not clothe it with the ermine or the attributes of a court by putting in the rules that it is so."[5]

And recognizing the fact that, in all prior impeachment trials, it had been called the "high court" of impeachment" he argued that those words "had been used rather by the Secretary

[2] Vol. 1, p. 321.
[3] *Ibid* 322.
[4] Vol. 3, par. 2057 (1907).
[5] 3 Hinds' Precedents 381.

in recording the proceedings than by the Senate itself."[6] Senator Edmunds dissented from this view, and called attention to the fact that on one occasion in the Blount Impeachment, the Senate by formal resolution had called itself a "court of impeachment."[7]

Senator Conkling's motion was adopted by a vote of sixteen to thirteen,[8] but it is not possible to state how many of the sixteen so voted because they thought the words were superfluous, as Senator Conkling argued, how many so voted because they agreed with Senator Morton, also a member of the committee which adopted and reported the rules with those words omitted, because their retention might "lead to consequences that we do not desire, and to difficulties",[9] or how many so voted because they did not consider that the Senate would be sitting as a court.

Notwithstanding the foregoing, when the committee, of which Senators Edmunds, Conkling, and Morton were members, came to amend the rules, they left in Rule XXIV the words "all process shall be served by the Sergeant-at-arms of the Senate, unless otherwise ordered by the *court*,"[10] and these words appear in that rule to this day, as a mute admission that, call it what you will, the Senate is a "court" when sitting for the trial of an impeachment.

Senator Edmunds might have gone much further than he did, and probably would have done so had he had time to look into the matter, for while it is true as stated by Senator Conkling that the words "High Court of Impeachment" were frequently the act of the secretary in recording the proceedings, yet those words, or the word "court" appeal constantly elsewhere in the proceedings. Even in so condensed a report as the "Extracts from the Journal of the United States Senate in All Cases of Impeachment Presented by the House of Representatives, 1798-1906,"[11] similar words quite constantly appear.

[6] 3 Hinds' Precedents 379.
[7] *Ibid* 381.
[8] *Ibid* 382.
[9] *Ibid* 379.
[10] *Ibid* 440.
[11] 62nd Congress, 2nd Session, Document No. 876.

Thus we find that Senator Tracy for the Senate Committee on the Impeachment of Judge Pickering, twice called it a "Court of Impeachment,"[12] and in the summons to the respondent, approved and issued by the Senate, it is four times so called.[13] So too in the impeachment of Judge Peck, Senator Tazewell called the Senate a "Court of Impeachment" once and a "court" twice.[14] Senator Webster called it a "court"[15] and Senator Foot called it a "High Court of Impeachment."[16] So too in the impeachment of Judge Humphreys, Manager Bingham called the Senate a "court,"[17] and Senator Foster twice called it "this high court of impeachment."[18]

So, too, the name would not down even in the arguments made during the impeachment of President Johnson, any more than it would in the rules, for we find Senator Howard, for the Special Committee of the Senate, calling it a "High Court of Impeachment"[19]; Senator Davis,[20] and Senator Cameron[21] calling it a "Court of Impeachment"; Senator Sumner, notwithstanding his argument to the contrary, calling it a "court"[22]; and Senator Stewart calling it a "court for the trial of the impeachment."[23]

In the impeachment of William W. Belknap, when party feeling was not running high, the Senate is ten times called a court or high court of impeachment,[24] including therein the formal replication filed by the House,[25] and the formal rejoinder filed by it,[26] and in a resolution of Manager Lord,[26a] and in another offered by Senator Edmunds.[27]

So also from "Proceedings in the Senate of the United States in the Matter of the Impeachment of Charles Swayne,"[28] we find that the Senate is called a "court" or a "high court of

[12] Journal, *etc.*, 19, 25.
[13] *Ibid* 23, 24.
[14] *Ibid* 62, 134, 141.
[15] *Ibid* 129.
[16] *Ibid* 132.
[17] *Ibid* 153.
[18] *Ibid* 151.
[19] *Ibid* 162.
[20] *Ibid* 195.
[21] *Ibid* 300.
[22] *Ibid* 236.
[23] *Ibid* 288.
[24] *Ibid* 340, 342, 344, 347, 379, 380, 385.
[25] *Ibid* 342.
[26] *Ibid* 347.
[26a] *Ibid* 379.
[27] *Ibid* 380.
[28] 58th Congress, 3rd Session, Document No. 694.

impeachment" twenty-one times[29] and a "court" sixty-four times.[30] Included among those who so spoke of it are Senators Bacon,[31] Bailey,[32] Fairbanks,[33] Foraker,[34] Hopkins,[35] Pettus,[36] and Spooner[37]; and Managers Clayton,[38] DeArmand,[39] Olmsted,[40] Palmer,[41] Perkins,[42] and Powers.[43]

And finally in the report of "The proceedings of the Senate and the House of Representatives on the Trial of the Impeachment of Robert W. Archbald" we find that the Senate is called a "court," or "high court of impeachment," at least one hundred and six times. Among those who so designated it are Senators Bacon,[44] Bailey,[45] Clark of Wyoming,[46] Cummins,[47] Gallinger,[48] Lodge,[49] Poindexter,[50] Smith of Georgia,[51] Smoot,[52] Sutherland,[53] and Works;[54] and Managers Clayton,[55] Sterling,[56] and Webb.[57]

[29] Proceedings, *etc.*, 54, 55, 56, 126, 151, 193, 236, 281, 289, 322, 323, 334, 371, 477, 607.

[30] *Ibid* 11, 16, 17, 18, 19, 21, 24, 25, 51, 57, 60, 66, 67, 82, 91, 106, 114, 128, 178, 180, 188, 189, 192, 193, 195, 197, 200, 266, 281, 334, 442, 482, 640.

[31] *Ibid* 16, 17, 151, 322.

[32] *Ibid* 24, 51, 91, 188, 192, 193, 195, 197.

[33] *Ibid* 54, 236, 289, 323, 477.

[34] *Ibid* 114, 334.

[35] *Ibid* 197.

[36] *Ibid* 188.

[37] *Ibid* 128, 193, 482.

[38] *Ibid* 281.

[39] *Ibid* 266.

[40] *Ibid* 180.

[41] *Ibid* 62, 66, 67, 82.

[42] *Ibid* 106.

[43] *Ibid* 300, 442, 640.

[44] Proceedings on the Impeachment of Judge Archbald, 20, 42, 60, 72, 73, 94, 95, 128, 175, 249, 291, 324, 388, 875, 1105, 1220.

[45] *Ibid* 17, 19.

[46] *Ibid* 18, 27, 38, 94, 95, 96, 128, 175, 231, 1048.

[47] *Ibid* 33.

[48] *Ibid* 34, 290, 291, 807, 1048, 1146, 1219.

[49] *Ibid* 30, 31, 60, 72.

[50] *Ibid* 157.

[51] *Ibid* 291.

[52] *Ibid* 874.

[53] *Ibid* 15.

[54] *Ibid* 15, 16, 17, 20.

[55] *Ibid* 37, 60, 63, 64, 65, 68, 72, 85, 88, 93, 94, 96, 100, 110, 129, 130, 153, 154, 272, 291.

[56] *Ibid* 150, 263, 711, 1386.

[57] *Ibid* 135.

It thus seems clear that neither the attempted formal exclusion from the rules, nor a fear of "consequences," can remove from the legal mind the legal concept that the Senate is sitting as a court, whether or not it is called by that name. That concept is the necessary consequence of our inheritance of impeachments from England, and of the constitutional provisions above quoted. In England the House of Lords in trying impeachment cases has always been called the "High Court of Impeachment,"[58] and it is difficult to understand why, when we were inheriting the system, we did not inherit in its essence the thing for which that title stood.[59]

If we turn to the constitutional provisions we find that they all bear out the idea that the proceeding is in its nature a judicial one:

"The Senate shall have the sole power to *try* all impeachments.

"When the President of the United States is *tried* the Chief Justice shall preside, and no person shall be *convicted* without the concurrence of two-thirds of the members present.

"Judgment in cases of impeachment shall not extend further than to removal from office. . . .

"The President shall have power to grant reprieves and pardons for *offenses* against the United States, except in cases of impeachment.

"The President . . . shall be removed from office on impeachment for, and *conviction* of, treason. . . .

"The *trial* of all crimes, except in cases of impeachment, shall be by jury. . . ."

"Trial," "conviction," "judgment," and their kindred terms, are all appropriate to judicial proceedings, and are not appropriate to anything else.

In this same connection much has been made at times of the constitutional requirement of a new oath to be taken by the Senators prior to an impeachment trial. Exactly what weight should be given to that requirement is not clear; but it may safely be concluded therefrom and from analogy to other judicial proceedings, that it was intended thereby to give greater solemnity to the trial, to impress upon the Senators their duty in the

[58] 4 Blackstone's Commentaries 258.

[59] See 6 Am. Law. Reg. (n. s.) 258-259.

particular case, to show that the Senate is then sitting in a different capacity than ordinarily, and that it occupies an entirely different situation than the House, which is prosecuting. It has been claimed by some that this requirement shows that the Senate is then sitting as a court, but it does not seem necessary to enter further into that controversy.

So, too, the precedents in the Senate are all in accord with the conclusion now asserted. In the Blount Impeachment the respondent was arrested and required to give bond,[60] a course constantly pursued under the English practice,[61] a practice with which the King's Bench, in Lord Danby's case, decided they could not interfere, so long as the parliament which impeached the respondent had not been dissolved.[62]

In the Swayne Impeachment the Senate by a vote of forty-five to twenty-eight decided that the respondent's voluntary statements, made before a Committee of the House of Representatives, could not be used against him on the trial of the impeachment because of the Fifth Amendment above quoted, and of Section 859 of the Revised Statutes, which provides:

"No testimony given by a witness before either House, or before a committee of either House of Congress, shall be used in evidence in any *criminal proceeding against him in any court,* except in a prosecution for perjury in giving such testimony."[63]

So, also, the House of Representatives in the proceedings against George F. Seward, looking to his impeachment, ruled that he could not be attached for contempt in declining to be sworn, and to produce documentary evidence, because only of the above quoted provision of the Fifth Amendment to the Constitution that no person "shall be compelled in any criminal case to be a witness against himself."[64]

So, too, all the commentators on the Constitution, when speaking of the Senate in trying impeachments, speak of it as a "court." The references quoted in this article show that to be

[60] 3 Hinds' Precedents, Sec. 2296.
[61] 6 Howell's State Trials 871.
[62] Woodeson's Lectures 616, 617.
[63] Swayne Impeachment Proceedings, 187-199.
[64] Hinds' Precedents, Sec. 1699.

so, as to the writers quoted, and as to the others an examination of the citations will prove it.

In antagonism to the views above expressed it has sometimes been argued that inasmuch as Art. III, Sec. 1 says that "The judicial powers of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" that that is a constitutional assertion that the Senate in trying impeachments does not sit as a court. Perhaps it would be better to say that it shows that the Senate, when trying impeachments, is not part of the general "judicial powers of the United States," but is rather part of the political powers thereof, and in that aspect it bears upon the question, hereinafter to be considered, of the character of the offences cognizable in impeachments. But whether or not that be so, it is clear from the location of the section quoted, as well as from its context, that it refers to the ordinary or usual "judicial powers of the United States," and does not refer to impeachment trials, any more than it does to courts-martial, though both were and are well-known methods for the trial of certain offences.

It may be said that the similarity of the proceedings to those in a court, may account for the frequent use of that word in the various impeachment trials; but if that be so it concedes all that is valuable in the claim now made, for it is of no moment whether the body which tries the impeachment is called a senate or a court, if it has the attributes of and proceeds like a court. In the one event, as in the other, the constitutional rights and privileges of the respondent are protected, and that is all he has any right to ask. Happily in this country, though it was not infrequently otherwise before the House of Lords, no respondent has ever been openly deprived of any of those rights or privileges, not even President Johnson, though partisan feeling reached its highest point at that time.

The Senate, then, being a court, or proceeding as if it were, certain necessary consequences follow, which usually have been recognized and accorded:

1st. The respondent is entitled "to be informed of the nature and cause of the accusation" against him.[65]

2nd. He is entitled "to have the assistance of counsel for his defence."[66]

3rd. He is entitled "to be confronted with the witnesses against him."[67]

4th. He is entitled "to have compulsory process for obtaining witnesses in his favor."[68]

5th. He cannot "be compelled . . . to be a witness against himself."[69]

And to those constitutional privileges are to be added the following which experience has demonstrated to be necessary for the just trial of causes.

6th. The rules of evidence applicable to courts are adhered to in these trials. It has been many times so held.[70]

7th. A reasonable doubt of the respondent's guilt must result in his acquittal. This also has been many times decided, in addition to that which is herein elsewhere said upon this point.[71]

8th. The Senate must find an intent to do wrong. It is, of course, admitted that a party will be presumed to intend the natural and necessary results of his voluntary acts, but that is a presumption only, and is not always inferable from the act done.[72] So ancient is this principle, and so universal is its application, that it has long since ripened into the maxim, *Actus non facit reum mens sit rea*, and has come to be regarded as one of the "fundamental legal principles" of our system of jurisprudence.[73] True, in many cases, the circumstances surrounding the

[65] Sixth Amendment to the Constitution.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] Fifth Amendment to the Constitution.
[70] 3 Hinds' Precedents 537-643; Woodeson's Lectures, 611, 612.
[71] Nebraska v. Hastings, 37 Neb. 96 (1893); Alabama v. Tally 102 Ala. 25 (1893); Alabama v. Robinson, 111 Ala. 482 (1895); 15 Am. & Eng. Ency. of Law (2nd Ed.) 1070; Watson on the Constitution (1910) Vol. 1, p. 214; Impeachment of Judge Barnard, pp. 2070, 2071.
[72] Bishop's Criminal Law, Sec. 252.
[73] Brown's Legal Maxims (8th American Ed.) 306-326.

performance of an act may be sufficient from which to infer the intent; but, nevertheless, in every criminal proceeding, the intent must be averred and proved to the satisfaction of both the trier of the law and the trier of the facts.

9th. And finally, recurring again to the Constitution, if once acquitted in impeachment proceedings he cannot "be subject for the same offence to be twice put in jeopardy."[74]

We come now to the next great question.

What Were the Offences Embraced Within the Language "Treason, Bribery or Other High Crimes and Misdemeanors"?

"Treason" is defined in the Constitution, and therefore, no difficulty arises regarding it. "Bribery" is not so defined, yet its signification is well known. Around the words "other high crimes and misdemeanors" the war has been waged in nearly every federal impeachment, and in numerous books and magazine articles dealing with the subject of impeachment.

With arguments "equally emphatic and mutually irreconcilable" some have asserted (a) that only those offences are impeachable which were indictable crimes at the time of the adoption of the Constitution, when there was no common law of the United States; while others have said (b) that every offence which had or could have been the subject of impeachment in England prior to the adoption of the Constitution, is still a subject of impeachment here; and between them every possible resting place has been preëmpted by other settlers. It is or ought to be clear, however, that each of the extreme cases is erroneous, and that both are founded on the same error. In its ultimate analysis claim (b) like claim (a) makes this clause of the Constitution a Procustean bed, its length fixed on September 17, 1787. No reason is apparent, however, why this provision of the Constitution should have been still-born, while the others are pulsating with a richer and better life than they possessed a century and a quarter ago. The fundamental error underlying

[74] Fifth Amendment to the Constitution.

both claims is the assertion that that which is intended to establish principles shall be treated as applicable only to facts existing at the time of their first statement. The inadequacy of the Commerce Clause alone would long ago have destroyed the Constitution had that interpretation been adopted, for railways, railroads, steamboats, telegraph, telephone, and aerial navigation, have each developed new situations not even thought of when the Constitution was adopted. It is true the government is one of limited powers, as the Tenth Amendment states, but within its limited sphere it is none the less supreme as Article VI of the Constitution says, and that sphere is large enough to embrace within it everything granted, or necessarily implied from the language used, though discovered or developed after the Constitution was adopted.

A frame of government, as a constitution is, is necessarily adopted for the future, perhaps a remote future, and not for the past, and those who adopt it cannot be presumed to have thought it was to be applied only to the then existing conditions, rather than to similar conditions certain to rise, for so to presume is to conclude that they deliberately planted in their own offspring the seed of an early death. It is well said by Judge Story in the great case of *Martin* v. *Hunter's Lessees.*[1]

"The Constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing the great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present, might seem salutory, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests shall require."

[1] 1 Wheaton 326 (1816).

What then is the true meaning of "other high crimes and misdemeanors" in Article II, Section 4? If, for the moment, we consider that section by itself, disassociated from all other clauses of the Constitution, and as having no historical meaning, it will be plain that the word "misdemeanors" cannot properly be limited to criminal misdemeanors. It is said in *Holmes* v. *Jennison et al.*:[2]

"In expounding the Constitution of the United States, every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition, and have shown the high talent, the caution and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous and unmeaning."

If the word "misdemeanors" refers only to criminal misdemeanors, then it is a useless and unnecessary word, for it is embraced within the word "crimes" and the clause might as well have read only "treason, bribery, or other high crimes."

That the word "crimes" ordinarily includes misdemeanors is not doubtful. Article IV, Section 2 of the Constitution says:

"A person charged in any State with treason, felony or other crime, who shall flee from prison, and be found in another State, shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime."

In construing that section the Supreme Court of the United States said in *Kentucky* v. *Dennison*:[3]

"The words 'treason, felony or other crime' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called 'misdemeanors' as well as treason and felony."

And all the later decisions sustain that view.[4]

[2] 14 Peters 570 (1840). [3] 24 How. 66 (1860).
[4] *Ex parte* Reggels, 114 U. S. 642 (1885).

But we are not permitted wholly to eliminate the word "misdemeanors" unless compelled so to do, and we are not in the present case, for the word has at least two meanings, one criminal and the other social, and if interpreted in the latter sense, as in England it often was, to cover offences not necessarily indictable, then it and every other word in the sentence, is given a meaning and use. Ascertained according to the principle last above quoted, the word "crimes" was used to negative the thought that the only criminal offences for which an impeachment would lie were "treason" and "bribery"; and the word "misdemeanors" was used to negative the thought that only "crimes" were impeachable.

The argument thus made cannot properly be answered by the maxims, *noscitur a sociis* and *capulatio verborum acceptionem in eodem sensu,* as is often attempted to be done in interpreting the meaning of the word "misdemeanors" in that section. It is true that those maxims are often valuable aids to interpretation, but, after all, they are only aids in ascertaining the meaning, and can have no application here, inasmuch as the words "other high crimes" exhaust the possibility of everything which *"in eodem sensu"* could be *ejusdem generis* with "treason" and "bribery," and hence the word "misdemeanors" must be discarded as useless, which is forbidden, or else it must be given other than a criminal meaning, which is the claim now made. If the language of the Constitution were "treason, bribery, or other high felonies and misdemeanors," the requirement of criminality as to "misdemeanors" would be clear under those maxims; but as it is, the conclusion is equally clear the other way.

Unless then some other provision of the Constitution limits the meaning of the word "misdemeanors," or historically there is something which gives to the clause "other high crimes and misdemeanors," a technical meaning antagonistic to that which it bears standing alone, its normal meaning, as above, must prevail.

Arguments, of greater or less force, have been made from this and other sections of the Constitution, claiming that a more extended meaning must be given to it than that involving crim-

inality; but no argument has been presented that it is limited in meaning by its context, except such as have been suggested under Article II, Section 2, which provides:

"The President . . . shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

and Article III, Section 2, which provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."

But, properly considered, neither of those provisions militate against the view already expressed. The only inference that can fairly be drawn from the use of the word "offences" in Article II, Section 2, instead of the word "crimes," is that it was recognized that there were "offences against the United States" which were not crimes, and all those, including fines, penalties and forfeitures, could be pardoned by the President;[5] but for "offences" resulting in a conviction upon impeachment, the President was not to be permitted to pardon.

The use of the word "crimes" in Article III, Section 2, tells for neither side of the controversy, for the reason that inasmuch as the proceedings in impeachment are a trial, and that a "trial" may be for a "crime," it was necessary therein to exclude "impeachments," in order to avoid the implication, which otherwise might arise, that criminal impeachments should be tried by a jury, a point made and overruled in the Blount Impeachment, yet repeatedly insisted upon by Senator Tazewell, because of the Sixth Amendment, and referred to also in a letter of President Jefferson to James (afterwards President) Monroe.[6]

If viewed from the historical standpoint more can be said. That we can and should so view it, is clear from the general rule of construction relating to statutes, which is directly applied to the Constitution in the case of *Rhode Island* v. *Massachusetts*:[7]

[5] Osborn v. U. S., 91. U. S. 474 (1875).
[6] Jeffersonian Cyclopedia 3864.
[7] 12 Peters 658 (1838).

"In the construction of the Constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy."

Thus considered it must be conceded that from an early date the words "high crimes and misdemeanors" had been used in connection with impeachments, and may be said to have acquired thereby a technical meaning in regard thereto. It is a grave question whether or not that fact in any way affects the matter, unless the people who adopted the constitution should have so understood them, for "the words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged,"[8] and it is the meaning of those who adopted the Constitution not of those who framed it,[9] that is the controlling factor.[10]

But whether that be so or not the same result is reached. In the impeachment of the Earl of Suffolk *et al.*,[11] in 1388, and nearly always since then, except when "treason" or "bribery and corruption" were alleged, the technical words in connection with impeachment charges have been "high crimes and misdemeanors." This will clearly appear from an examination of the impeachment trials which have been held. But that fact carries us but a short step forward. The question really is: Were those techincal words used to cover only criminal offences? A very brief examination of the cases will show that they were not. Of the seven articles of impeachment against the Earl of Suffolk, but three can by any method of interpretation be held to be criminal offences, and so it appears throughout all the trials.

If we take only the cases in which "high crimes and misdemeanors" are charged, we find that, so far as the records show, no respondent was acquitted prior to the adoption of our Constitution, because the offences named in the articles were not in-

[8] Martin v. Hunter's Lessees, 1 Wheaton 326 (1816); Gibbons v. Ogden, 9 Wheaton 1 (1829).

[9] Legal Tender Cases, 79 U. S. 655 (1870).

[10] Sturges v. Croninshield, 4 Wheat. 122 (1819).

[11] 1 Howell's St. Trials 90.

dictable; and in at least the following cases the respondents were convicted, *inter alia*, of offences not indictable, *viz.*: Earl of Suffolk *et al.*,[12] Sir Giles Mompesson,[13] Sir Francis Michell,[14] Lord Treasurer Middlesex,[15] George Benyon,[16] Sir Richard Gurney,[17] Earl of Northampton *et al.*,[18] Archbishop Laud,[19] Henry Sacheverell,[20] and Earl of Macclesfield.[21] In addition thereto in a large number of cases the Commons impeached for offences not indictable, but the proceedings lapsed by the proroging or dissolution of Parliament, or because deemed not important enough to continue; or the respondents were acquitted because of disputes between the two Houses of Parliament; or for reasons in no way shown to be connected with the character of the offence, so far as indictability is concerned. Perhaps no one has summarized those impeachments better than has Judge Story in his *Commentaries on the Constitution*.[22]

"In examining the parliamentary history of impeachments, it will be found that many offences, not easily definable by law, and many of purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and for acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws and introduce arbitrary power. So, where the lord chancellor has been thought to put the great seal to an ignominious treaty; a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust; a privy counsellor to have propounded, or supported pernicious and dishonorable measures; or a confidential adviser of his sovereign to have obtained exorbitant grants, or incompatible employments; these have been all deemed impeachable offences. Some of the offences, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppresing a spirit of favoritism and court intrigue. Thus, persons have been impeached for giving bad counsel to the king;

[12] 1 Howell's St. Trials 90.
[13] 2 *Ibid* 1132.
[14] 4 *Ibid* 141.
[15] 4 *Ibid* 176.
[16] 15 *Ibid* 1
[17] 3rd Ed., Sec. 800.
[18] 2 *Ibid* 1120.
[19] 2 *Ibid* 1184.
[20] 4 *Ibid* 159.
[21] 4 *Ibid* 315.
[22] 16 *Ibid* 767.

advising a prejudicial peace; enticing the king to act against the advice of parliament; purchasing offices; giving medicine to the king without the advice of physicians; preventing other persons from giving counsel to the king, except in their presence; and prosecuting exorbitant personal grants from the king. But others, again, were founded in the most salutory public justice; such as impeachment for malversations and neglects in office; for encouraging pirates; for official oppressions, extortions and deceits; and especially for putting good magistrates out of office and advancing bad."

A still more extensive catalogue is given by Judge Lawrence in his article in the *American Law Register*,[23] which was adopted by the Managers of the House, and submitted as their brief, during the impeachment of President Johnson.[24] And it may not be inappropriate to quote what Lord Brougham said of the trial of Queen Caroline:

"The House of Commons might impeach for whatever was indictable, but they also might impeach in cases where no indictment could be found. . . .

"The learned attorney-general had held that no impeachment could lie unless some law was violated; but the opinion was contrary to the doctrine laid down by the greatest writers on the law of impeachment. Lork Coke did not so limit the power of parliament. He regarded this power as most extensive, and in describing it quoted this remarkable expression: 'That it was so large and capacious that he could not place bounds to it, either in space or time.' In short, this maxim has been laid down as irrefragable, that whatever mischief is done, and no remedy could otherwise be obtained, it is competent for parliament to impeach."

But it is said we ought to take only "the reports of the well considered cases of parliamentary impeachments, cases which were controlled by the judgments instead of the passions of men."[25] In one sense at least that is undoubtedly true, but who is to decide which are the "well considered cases"? Human nature is such that generally speaking those cases are "well considered" to each of us, which agree with our own views, and those are ill considered which disagree therewith; and we are all too prone to attribute to the "passions of men," or to their prejudices or self-interest, "judgments" which do not please us.

[23] 6 Am. L. Reg. (N. S.) 641.
[24] Suppl. to Cong. Globe, 2nd Sess., 40th Congress, 41-51.
[25] House Journal, 2nd Sess., 40th Congress 44, 53.

In matters, like the English impeachments, where there are neither statutes nor written constitutions to control the question under consideration, we are necessarily driven to determine what is the weight of authority upon a given proposition, unless we find the earlier cases overruled by the later ones, in which event the latter would ordinarily control. That much is conceded by Professor Dwight,[26] but he asserts boldly:

"The decided weight of authority is that no impeachment will lie except for a true crime, or, in other words, for a breach of the common law, or statute, which, if committed within any county of England, would be the subject of indictment or information."

It would be interesting to know what kind of scales were used in determining that "decided weight of authority," for it may safely be said that there is no authority whatsoever so deciding, unless it be the case of Lord Melville, decided in 1806, hereinafter to be more fully referred to. It is true that most of the charges were of crimes, and this must always be so, so long as impeachments are serious matters; but it no more follows therefrom that impeachments are limited to crimes, than it would follow that the "decided weight of authority" is that tenants cannot be legally excluded from their leaseholds except for non-payment of rent, because usually they are excluded for that reason.

It is also true that the respondents in a number of the cases complained that they ought not to be impeached for the acts complained of, *inter alia,* because they were not of sufficient magnitude; but so far as ascertainable there was no allegation that to be impeachable the act must be indictable. No writer on the subject, no counsel defending an impeached person, has pointed to any impeachment in which that question was raised, unless as stated, it is the case of Lord Viscount Melville in 1806.[27]

In that case Lord Melville, who was Treasurer of the Navy, was charged with wrongfully using, or permitting to be used, public moneys. The evidence did not justify the charge that any corrupt use thereof was made, but it did justify, or at least

[26] Trial by Impeachment, 6 Am. Law Reg. (N. S.) 257.
[27] 29 Howell's St. Trials, 550.

left in doubt, the question as to whether or not express authority was given for the use actually made of it. Thereupon the Lords submitted to the judges the following question:

"3. Whether it was lawful for the Treasurer of the Navy, before the passing of the Act 25 Geo. 3rd, c. 31, and more especially when by warrant from His Majesty, his salary as such treasurer as aforesaid, was augmented in full satisfaction for all wages, fees, and other profits, and emoluments, to apply any sum of money to him for many services, to any other use whatsoever, public or private, without express authority for so doing; and whether such application by such treasurer would have been a misdemeanor, or punishable by information or indictment?"

The judges replied:

"It was not unlawful for the Treasurer of the Navy, before the Act 25 Geo. 3rd, c. 31, although after the warrant stated in the question, to apply any sum of money imprested to him for navy services, to other uses, public or private, without express authority for so doing, so as to constitute a misdemeanor punishable by information or indictment."

In other words, it was decided that prior to the passage of the act referred to it was not unlawful for the treasurer to use the public moneys "imprested to him for navy services," for other public uses, "without express authority for so doing." The question and answer referred to "public or private" uses, but no one would pretend that the use of public moneys for private purposes was not both unlawful and indictable.

The respondent was acquitted, but how many of the Lords voted to acquit him because of the above answer, and how many because his alleged offences were twenty-four years old at the time of his trial, and how many for other reasons, does not appear. It is not to be wondered at that he was acquitted when it is remembered that his impeachment was only carried in the House of Commons by the deciding vote of the Speaker, the members voting 216 for and 216 against, the younger Pitt, then Prime Minister, doing all in his power to defeat the impeachment,[28] especially when the judges ruled that he had done nothing unlawful, and had only followed the custom of prior treasurers. He has studied impeachments in vain who does not know

[28] 30 Leisure Hour 666.

that an acquittal under such circumstances decides no legal principle. Beyond that, however, the point here is that that record does not disclose that the acquittal was because the offence charged was not indictable, and hence it is not an authority for the proposition that, under the English practice, impeachment will not lie for other than indictable offences.

It is clear then that the true construction of Article II, Section 4, standing alone, compels the conclusion that the word "misdemeanors" does not mean criminal misdemeanors only; that there is nothing in the other provisions of the Constitution, nor in the English practice, which otherwise limits that construction; and hence it must be held to mean other than criminal misdemeanors.

But if the matter may be considered as doubtful, we are entitled to ask what construction has been placed upon the words "high crimes and misdemeanors" in this country, under the rules well expressed in *McPherson* v. *Blacker*:[29]

> "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained contemporaneous and subsequent practical construction are entitled to the greatest weight."

It will be found that the same conclusion is reached. A full abstract of the articles in each case is not necessary here, and they need be but briefly stated.

In Blount's case it may be conceded that all the articles charged a criminal offense, but the proceedings were dismissed because he was not a "civil officer of the United States," and hence not impeachable. Judge Pickering was impeached and convicted for releasing a vessel without requiring a bond, for refusing to hear witnesses in the case, for refusing to allow an appeal from his judgment, and for intoxication and profanity while on the Bench, none of which were indictable offences. Judge Chase was impeached and acquitted for refusing to al-

[29] 146 U. S. 1 (1894).

low counsel to argue questions of law to the jury, for overruling the request of a juror that he be excused, for overruling an offer of proof because he did not think it broad enough, for compelling counsel to submit certain questions to witnesses in writing, for awarding a capias when he should only have awarded a summons, for trying a case at too early a date, and for intemperately charging the grand jury in a quasi-political case, none of which were indictable offences. Judge Peck was impeached and acquitted for wrongfully punishing an attorney for contempt, an indictable offence. Judge Humphreys was impeached and convicted of treason, of neglect of duty, of acting as a judge of a court of the Confederate States, and while so acting, of wrongfully arresting citizens. President Johnson was impeached and acquitted for violating the Tenure of Office Act, in removing and conspiring with others to remove Stanton as Secretary of War, in appointing General Thomas to that office, and conspiring with others to put him in possession thereof and exclude Stanton therefrom, for thereby attempting unlawfully to control the property of the United States and disburse the funds appropriated to the said department, for claiming the right to give orders to subordinate military officers other than through the general of the army, and for villifying Congress and asserting that it was a congress of but part of the United States. Secretary Belknap was impeached for bribery. Judge Swayne was impeached and acquitted for wrongfully certifying to and receiving pay for an excessive sum for travelling expenses, for using provisions in and travelling on a parlor car in the possession of a receiver of his appointment, without paying therefor, for non-residence in the district in which he was serving, and for wrongfully punishing two attorneys and another person for contempt. Judge Archbald was tried and convicted on five of thirteen articles, not one of which charged an indictable offence.

It will be noticed, therefore, that the House of Representatives has asserted the right to impeach for other than indictable offences in every impeachment, except those of Blount and Belknap, wherein no such question arose. In the impeachments of Chase, Peck, Johnson, and Swayne a majority of the Senate,

though not two-thirds thereof, declared the respondents guilty of offences not indictable. And in the Pickering, Humphreys and Archbald cases more than two-thirds of the Senate convicted the respondents and punished them for offences not indictable.

The only other possible "contemporaneous . . . construction" would be the language expressed by the framers of the Constitution, either during its framing or shortly thereafter, and the debates in the state conventions which adopted it. While it is well recognized that the debates in the Convention are not controlling, if for no other reason than because it is "We, the people of the United States . . . (who) do ordain and establish this Constitution," yet the courts constantly resort to those debates at least for the purpose of having light thrown upon the history of the times when the Constitution was adopted, especially in view of the fact that the members of the Federal Convention were the greatest public men of that day.

The debates on the subject in the Federal Convention have hereinbefore been discussed. Nowhere therein is it even suggested that indictability has any connection with impeachability. Cunning Bedford, Jr., states that "impeachments would reach misfeasance only, not incapacity."[30] Elbridge Gerry desired a council to assist the President partly because they may be called upon to account for their opinions and impeached."[31] The Convention first voted that the President should be "removable on impeachment and conviction of mal-practice or neglect of duty."[32] Alexander Hamilton's "sketch" allowed "impeachment for mal- and corrupt conduct."[33] Gouveneur Morris admitted that "corruption and some few other offences . . . ought to be impeachable."[34] James Madison "thought it indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief magistrate."[35] Gouveneur Morris said, "The Executive

[30] 1 Farrand's Records of Federal Convention 16.
[31] *Ibid* 71.
[32] *Ibid* 78.
[33] *Ibid* 292, 293.
[34] 2 Farrand 64, 69.
[35] *Ibid.*

ought, therefore, to be impeachable for treachery. Corrupting his electors and incapacity were other causes of impeachment."[36]

The Committee of Eleven reported that impeachment should be had for "treason or bribery,"[37] and Colonel Mason moved to add the words "or maladministration" after the word "bribery," because the words "treason or bribery" are inadequate. Mr. Madison thought "maladministration" too vague, and then "maladministration" was withdrawn and "other high crimes and misdemeanors" substituted.[38]

The only other place where like language was used was in Article XV, reported by the Committee on Detail. It required fugitives from justice, charged with "treason, felony or high misdemeanor," to be returned to the state having jurisdiction of the offence.[39] The report of the debates says:

"The words 'high misdemeanor' were struck out, and 'other crime' inserted, in order to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." [40]

The reason thus given seems a little odd, for one cannot well see how "other crimes" with that context, in view of the *ejusdem generis* rule of construction, could have a more extended meaning than "high misdemeanor" unless the latter did not include crimes at all, which would be favorable to the argument now being presented; but in no view of the matter is the change favorable to the opposite view.

An examination into the debates in the various state conventions which ratified the Constitution throws but little light upon the subject. In most of them the subject of impeachment was not debated at all, and, if referred to, it was but briefly stated as part of the pending plan. As appears from the Fourth Volume of Elliott's Debates, it was referred to at considerable length in the North Carolina Convention, and somewhat also in the South Carolina Convention. The latter debates give us no light upon the pending question, and the former but little,

[36] 2 Farrand 64, 69.
[37] *Ibid* 550, 552.
[38] *Ibid* 443.
[39] *Ibid* 495.
[40] *Ibid* 187, 188.

though it was sometimes said that the object of impeachment was the removal from office of incompetent or corrupt officials, for conduct which would not or could not be prosecuted in the ordinary criminal tribunals. There was no argument over the matter, however, the main dispute being over the question as to whether or not the Senate would convict those to whose appointment it had consented under the provisions of Article II, Section 2.

It is not without significance that in the many excellent and exhaustive briefs prepared by counsel for respondents in our impeachment proceedings, some of which were tried while members of the convention which framed the Constitution still lived, there is no assertion that any member of that convention had expressed the opinion that impeachment was only intended to cover indictable offences. A somewhat careful independent examination fails to disclose any such statement, save as hereinafter set forth. Three of the most active and able members of that convention have, however, expressed an antagonistic view of that claim. Thus Hamilton said:[41]

"A well constituted court for the trial of impeachments, is an object not more to be desired, than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."

Madison, in the debate in Congress on the bill to establish a Department of Foreign Affairs said:

"Perhaps the greatest danger . . . . of abuse in the executive power lies in the improper continuance of bad men in office. But . . . if an unworthy man be continued in office by an unworthy President, the House of Representatives can impeach him, and the Senate can remove him whether the President chooses or not. The danger then consists merely in this: the President can displace from office a man whose merits require that he should continue in it. What will be the motives which the President can put for such abuse of his power, and the restraints that operate to prevent it? In the first place he will be impeachable by the House before the Senate for such an act of maladministration; for I con-

[41] No. 65, Federalist.

tend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."[42]

And James (afterwards Mr. Justice) Wilson, said:[43]

"In the United States . . . impeachments are confined to political characters, to political crimes, and misdemeanors and to political punishments."

The only known instance to the contrary, if it can be said to be such, is that of Luther Martin, a member of the convention from Maryland, who did not approve the Constitution, did not sign it when engrossed, and became one of its strongest opponents, both before the people and in the Maryland Convention which ratified it. He was one of the counsel for the respondent in the impeachment of Judge Chase, and therein, as such counsel, very ably but unconvincingly maintained that impeachment would only lie for indictable offences.[44]

It may not be inappropriate to remark that in the impeachment of William Blount (himself a member of the Federal Convention) one of his counsel was Jared Ingersoll (also a member thereof), but the question now under consideration was not raised, argued or decided. So also in the impeachment of Judge Chase, Senators Baldwin and Dayton had been members of the Federal Convention, and the former voted guilty on articles one, three and eight, which did not charge indictable offences. The latter voted not guilty on all the articles. The reason for the votes of either is not given in the record of the case.

It is of no small consequence, moreover, that no commentator upon the Constitution has said that impeachment was limited to indictable offences. A few state the question without passing upon it. Thus, Mr. Justice Miller, in his lectures before the students of the Law School of the National University (1891), contents himself with saying[45] that "no satisfactory definition has ever been given, or generally accepted, of the phrase 'other high crimes and misdemeanors'" probably be-

[42] 4 Elliott's Debates 373.
[43] 2 Wilson's Law Lectures 166.
[44] 3 Hind's Precedents, 760 *et seq.*
[45] Page 214.

cause the subject was not one to be discussed at length in that presence; and Meechem, in *The Law of Public Offices and Officers* (1890), states the differing views,[46] but does not discuss the matter for want of space, and because only indirectly connected with his subject. But it is believed that, without exception, all who do consider it assert that impeachment will lie for offences not indictable.[47]

It is also of some importance that judicial opinion upon the subject bears out the contention now being made. In Connecticut the Superior Court is given jurisdiction of "all offences the punishment whereof is death, or confinement in Newgate, or incapacity to hold office, and also of high crimes and misdemeanors." In State v. Knapp[48] the question which arose was whether or not the offence charged was a high crime and misdemeanor, and it was ruled:

"High crimes and misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet owing to some technical circumstances, did not fall within the definition of felony."

Two other cases have a direct bearing upon the question at issue. In *State of Nevada* v. *Borowsky*,[49] a public administrator was indicted for the appropriation to his own use of funds of an estate in his charge. The statute, upon which the indictment was founded, provided:

"For any wilful misdemeanor in office, any public administrator may be indicted, tried, and, if guilty, fined in any sum not exceeding $2,000, and removed from office."

[46] Sec. 472.

[47] Without stopping to quote them reference may be made to Story on the Constitution (3rd Ed.) Secs. 764, 796, 797, 799, 800; Rawle on the Constitution (2nd Ed.) p. 273; Tucker on the Constitution (1899) Vol. 1, Sec. 200; Cooley's General Principles of Constitutional Law (1891) pp. 165-166; Curtis' Constitutional History of the U. S. (1895) Vol. 1, p. 482; Pomeroy's Constitutional Law (9th Ed.) Secs. 721, 724, 725, 726; Black's Hand Book of American Constitutional Law (3rd Ed.) pp. 137-138; Foster on the Constitution, p. 582 *et seq;* Watson on the Constitution (1910) Vol. 2, pp. 1027-1038; Willoughby on the Constitutional Law of the U. S. (1910) Vol. 2, Sec. 652; Boutwell on the Constitution of the U. S. at the End of the 1st Century, Sec. 427.

[48] 6 Conn., 415-417 (1827).

[49] 11 Nevada, 119 (1876).

The Court said:

"The fault of this argument, (*i. e.*, that no crime was alleged) I think, consists in attributing to the word 'misdemeanor' as used in the statute, its technical sense of a species of crime. It is evident, I think, that it is used in its more comprehensive sense of misbehavior, misconduct, violation of duty; for otherwise the word 'wilful', by which it is qualified, becomes entirely superfluous. Every crime is necessarily wilful, but misconduct, or violation of duty, is not. Taken in the latter sense, the word misdemeanor is properly qualified by the word wilful; in the former signification, the expression involves the worst sort of tautology. Besides in the one case, the whole provision becomes utterly meaningless, while in the other the construction is plain and sensible."

In *State of Nebraska* v. *Hastings*,[50] the respondent was impeached under the provision of Article V, Section 5 of the Constitution of that state, which provided that all civil officers of the state should be "liable to impeachment for any misdemeanor in office." The Court said:

"It is sufficient for our purpose at present to say that we are constrained to reject the views of Professor Dwight, Judge Curtis, and other advocates of the doctrine that an impeachable misdemeanor is necessarily an indictable offence, as too narrow, and tending to defeat rather than promote the end for which an impeachment, as a remedy, was designed, and not in harmony with the fundamental view of constitutional construction. On the other hand the contention of counsel for the State, that the term misdemeanor in office is not susceptible of a legal definition, but that every such proceeding shall be determined upon the facts in the particular case, is, to say the least, strikingly illogical."

After quoting from a number of authorities and text writers, the Court proceeds:

"It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the Constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty wilfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant, as to warrant the inference that it was wilful or corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a wilful disregard thereof, it is not impeachable though it may be highly prejudicial to the interests of the State."

[50] 37 Neb. 96 (1893).

In presenting the views above expressed, most of the antagonistic arguments have been incidentally considered. It remains, however, to notice a few others.

(a) It is said that inasmuch as the *lex parliamenti* does not furnish a definition for "other high crimes and misdemeanors," recourse must be had to the common law definition thereof, and we are pointed to what Blackstone says:[51]

"A crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage 'crimes' is made use of to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentle name of 'misdemeanors' only."

If "faults and omissions" are therein used with Blackstone's customary accuracy of expression, then they do not refer to "crimes" at all, and the quotation is not antagonistic to the present contention. If not so used, then it must be said that Blackstone had no better light upon this subject than we have, and the statement quoted does not express the fact. It never was accurate to state that "crimes and misdemeanors . . . . properly speaking are (criminally speaking) mere synoynmous terms." "Properly speaking" "crimes" embraces felonies as well as "misdemeanors," especially in construing the Constitution of the United States.[52] Were it true that crimes and misdemeanors are synonoymous terms, then the only impeachable felony would be treason, for the clause would then cover only treason, bribery and other high misdemeanors. But, as shown above, we canont reject either "crimes" or "misdemeanors" as useless, and interpret the clause as if it read "treason, bribery, or other high crimes and crimes," or "treason, bribery or other high misdemeanors and misdemeanors."

(b) It is contended by the anonymous writer of the brief for the respondent in the impeachment of Charles Swayne[53] that inasmuch as the English practice must be read into our Constitution by reason of the generality of the language used in Article II, Section 4, now under consideration; and inasmuch as,

[51] 4 Black. Com. 5.

[52] Kentucky v. Dennison, 65 U. S. 66 (1861); *Ex parte* Reggel 114 U. S. 642 (1885).

[53] Senate Document No. 196, p. 373 *et seq.*

prior to the adoption of the Constitution, no judge had been impeached in England except for misbehavior *virtute officii;* and inasmuch as the status then became fixed in our Constitution and could not thereafter be added to; that, therefore, no judge can be impeached here except for like causes. But that conclusion is clearly a *non sequitur.* Waiving all the other manifest defects in the reasoning, and assuming the fact to be that no English judge was ever impeached except for misbehavior in office, it does not necessarily follow that, under the *lex parliamenti,* none could have been. If the status was fixed, it was fixed not by illustrations of the power, but by what the power in fact was. Would it be contended that if no English judge had ever been impeached, that none of ours could be? Moreover, the attempt is to make judges impeachable for fewer offences than those for which other "civil officers" are impeached, though the language of Article II, Section 4, is general, and applies alike to them and all other "civil officers"—an impossible construction.

(c) It is also said that it is absolutely necessary so to construe the Constitution, for otherwise impeached officials would be at the mercy of a temporary majority in Congress. But with or without that definition they are at that mercy. True, many of our impeachments have been decided by partisan votes, but that is an indictment of the whole system, and not of this part of it alone. It has often truly been said that the argument *ab inconvientii* is an unsafe one. It is certainly so here, for it simply says: "I do not think the words have their natural meaning, because to give them that meaning is to enable men to decide according to their predilections"—a course they will pursue in any event.

It seems clear, therefore, notwithstanding the interesting arguments to the contrary, that the House in prosecuting and the Senate in trying impeachments, are not limited to offences which are indictable.

Hence we reach the next great question.

(To be concluded.)

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